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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

WILLAMETTE RIVERKEEPER,
CONSERVATION ANGLER,

Plaintiffs,

vs.

U.S. ARMY CORPS OF ENGINEERS, JOSE
AGUILAR,

Defendants.

Case No.: 6:17-cv-00801-MC

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

(Violation of Endangered Species Act)

1. This is a civil suit for declaratory and injunctive relief. Winter steelhead trout, a remarkable fish species that has existed since recorded time in the upper Willamette River in Oregon, is threatened with extinction under the Endangered Species Act (“ESA”). New data and information reveal that it is in further precipitous decline. Plaintiffs Willamette Riverkeeper and Conservation Angler seek to compel Defendants U.S. Army Corps of Engineers et al. (“Corps”) to comply with the ESA by reinitiating consultation with the National Marine Fisheries Service (“NMFS”) to address new information related to effects of the Corps’ authorization, funding, and facilitation of releasing non-native summer steelhead trout into habitat for winter steelhead trout in the upper Willamette River basin. Plaintiffs also seek to compel the Corps to comply with the ESA by preventing further irreversible and/or irretrievable commitments of resources before it completes reinitiated consultation. Plaintiffs also seek to compel the Corps to comply with the ESA by preventing further “take” of winter steelhead trout by introduced hatchery rainbow trout.

Jurisdiction.

2. An actual, justiciable controversy exists between the parties. This Court has jurisdiction under 16 U.S.C. § 1540(g)(1). Pursuant to the ESA, more than 60 days ago, Plaintiffs served the Corps with written notice of their intent to sue. 16 U.S.C. § 1540(g)(2). The Corps has not remedied its violations of the ESA, which are ongoing and likely to continue. The relief Plaintiffs seek is proper under 16 U.S.C. § 1540(g)(1)(A), 28 U.S.C. §§ 2201–02, and 5 U.S.C. §§ 701–06.

3. Venue is proper in this Court under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391, because the South Santiam Hatchery, the Marion Forks Hatchery, and other facilities or activities owned or financed by the Corps are located in Marion County, which is within this judicial district; all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district; and agency records or personnel are located in this district.

Parties.

4. Plaintiff Willamette Riverkeeper was founded in 1996, and focuses on protecting and restoring the resources of the Willamette River basin in Oregon. Willamette Riverkeeper works on programs and projects ranging from Clean Water Act compliance and river education, to

Superfund cleanup and restoring habitat. Willamette Riverkeeper filed suit to force the Corps and other federal action agencies to consult with NMFS as to the effects of federal projects and facilities on ESA-listed fish in the upper Willamette River basin, including winter steelhead trout. That consultation resulted in a 2008 Biological Opinion related to effects on winter steelhead trout and spring Chinook salmon of federal facilities and projects in the upper Willamette River basin.

5. Plaintiff Conservation Angler is a non-profit conservation group that advocates for wild fish and fisheries, and advocates to protect and conserve wild steelhead, salmon, trout and char throughout their Pacific range. The Conservation Angler is a watch-dog organization - holding public agencies, countries and nations accountable for protecting and conserving wild fish for present and future generations - using education, legal, administrative and political means necessary to prevent the extinction and to foster a long-term recovery of wild steelhead trout, salmon, and char to fishable and ultimately, harvestable abundance.

6. Plaintiffs Willamette Riverkeeper and Conservation Angler have suffered and continue to suffer harm from the Corps' violation of the ESA. Plaintiffs' members include anglers who enjoy fishing, and would seek and enjoy catch and release fishing of populations of winter steelhead trout in the North Santiam River and South Santiam River basins, if the populations were recovered. Plaintiffs' members have fewer opportunities to do so because catching and releasing winter steelhead trout will harm the few that remain, and hamper recovery of the populations. Plaintiffs' members include anglers and others with scientific and professional interests in the genetic integrity of winter steelhead trout. Plaintiffs' members also include anglers who are outfitters or guides who seek to advance commercial interests in what could be a winter steelhead trout fishery in the North Santiam River and South Santiam River basins.

7. Defendant U.S. Army Corps of Engineers is an agency of the Department of the Army. The Corps has built and operates federal dams and other facilities in the North Santiam River and South Santiam River basins. These dams and facilities harm and impede recovery of native wild winter steelhead trout in these basins.

8. Defendant Jose Aguilar is the Corps' Commander and District Engineer in Portland, Oregon. Mr. Aguilar is sued in his official capacity. Mr. Aguilar is responsible for ensuring that the Corps complies with the ESA in its funding and operation of federal and other facilities in the Upper Willamette River basin.

Allegations.

9. The Willamette River originates in the Cascade Mountains in Oregon and flows generally northward to its confluence with the Columbia River. The mainstem Willamette River is 187 miles long. At river mile 27, the Willamette River falls approximately 35 feet. By volume of water, Willamette Falls is the largest in Oregon, and the sixth largest in the United States. Historically, in its natural state, Willamette Falls was a barrier to the upstream migration of anadromous fish, except during relatively high flows in the winter or early spring. Historically, steelhead trout (*Oncorhynchus mykiss*) and Chinook salmon (*Oncorhynchus tshawytscha*) were able to ascend Willamette Falls to reach the Willamette River basin above the falls. The part of the Willamette River basin above Willamette Falls is called the "upper" Willamette River.

10. The North Santiam River originates near Three Fingered Jack in the Cascade Mountains and flows roughly 92 miles to its confluence with the South Santiam River. The Corps built Big Cliff Dam and Detroit Dam on the North Santiam River. Big Cliff Dam is downstream of Detroit Dam. Big Cliff Dam is a barrier to the upstream migration of adult steelhead trout and Chinook salmon.

11. The South Santiam River originates at the confluence of Sevenmile and Squaw Creeks in the Cascade Mountains and flows roughly 66 miles to its confluence with the North Santiam River. The Corps built Foster Dam on the South Santiam River. Foster Dam was built with fish passage facilities. The fish passage facilities (or ladder) at Foster Dam is no longer effective to pass fish. Foster Dam is a barrier to the upstream migration of adult anadromous steelhead trout and Chinook salmon.

12. After the North Santiam River and South Santiam River join, they form the Santiam River, which flows roughly 10 miles to its confluence with the Willamette River upstream of Willamette Falls.

13. Steelhead trout are usually dark-olive in color, shading to silvery-white on the underside, with a heavily-speckled body and a pink to red stripe running along the sides. Steelhead trout hatch in gravel-bottomed, fast-flowing, well-oxygenated rivers and streams. Individual steelhead trout can develop differently, depending on the environment. Some steelhead trout stay in fresh water all of their lives. These fish are called rainbow trout. Steelhead trout that migrate to the ocean and back are “anadromous,” and they develop a slimmer profile, become more silvery in color, and typically grow larger than rainbow trout. Unlike other Pacific salmonids, steelhead trout are iteroparous, meaning they do not always die after spawning.

14. On March 25, 1999, the National Marine Fisheries Service (“NMFS”) listed naturally-spawned anadromous steelhead trout in the upper Willamette River evolutionarily significant unit (“ESU”) as threatened with extinction under the ESA. This ESU occupies the upper Willamette River and its tributaries, from Willamette Falls upstream to the Calapooia River, inclusive.

15. Steelhead trout in the upper Willamette River basin are genetically distinct from steelhead trout in the lower Willamette River basin. Steelhead trout in the upper Willamette River basin are late-migrating (“winter”) steelhead. Returning adult winter steelhead trout in the upper Willamette River basin enter fresh water primarily in March and April. Winter steelhead trout in the upper Willamette River basin spawn generally in March and April. Winter steelhead trout in the upper Willamette River basin rear in freshwater for up to one year before migrating to the ocean.

16. In 2006, NMFS listed or re-listed ten distinct population segments (“DPSs”) of West Coast steelhead trout as threatened with extinction, or as endangered, under the ESA. The listing includes the upper Willamette River DPS of winter steelhead trout. The upper Willamette River DPS of winter steelhead trout is listed as threatened with extinction. In its 2006 listing, NMFS found that the recent (at that time) 5-year mean abundance for the upper Willamette River DPS of winter steelhead trout is 5,819 adults.

17. Winter steelhead trout in the upper Willamette River primarily occupy four subbasins: the Mollala River, the North Santiam River, the South Santiam River, and the Calapooia River. Each of these subbasins has a distinct population of winter steelhead trout. The South Santiam River and the North Santiam River are the two “core” populations of winter steelhead trout in the upper Willamette River DPS. Winter steelhead trout spawning in the upper Willamette River basin is concentrated in the North Santiam River and South Santiam River basins.

18. In the past, the Oregon Department of Fish and Wildlife (“ODFW”) operated a winter steelhead trout hatchery program in the upper Willamette River basin. Hatchery winter steelhead trout programs in the upper Willamette River basin were terminated in 1999.

19. In the late 1960s, ODFW introduced “summer” steelhead trout into the upper Willamette River basin. The summer steelhead trout originated from the Washougal River and Skamania Hatchery in Washington. Summer steelhead trout are not native to the upper Willamette River. Summer steelhead trout are not part of the winter steelhead trout DPS.

20. ODFW has set an annual harvest goal of 5,600 summer steelhead trout in the South Santiam River basin. ODFW has set an annual harvest goal of 4,500 summer steelhead trout in the North Santiam River basin.

21. Summer steelhead trout adults return to the South Santiam River and North Santiam River basins generally from March through June. Eggs are collected from some returning summer steelhead trout adults. Summer steelhead trout eggs are used to raise hatchery summer steelhead trout for release. It generally takes approximately one year to rear summer steelhead trout in a hatchery before release. Historically, summer steelhead trout were released into the South Santiam River and the North Santiam River basins in April or May. Summer steelhead trout released from hatcheries are typically larger than sympatric winter steelhead trout. Some summer steelhead trout released into the North Santiam River and into the South Santiam River migrate to the ocean. Some summer steelhead trout released into the North Santiam River and into the South Santiam River residualize.

22. Residualized adult summer steelhead trout prey upon winter steelhead trout fry and juveniles in the North Santiam River and South Santiam River basins. Juvenile summer steelhead

trout prey upon age-0 and age-1 juvenile winter steelhead trout in the North Santiam River and South Santiam River basins.

23. Winter steelhead trout and summer steelhead trout spawn naturally in some of the same areas in the upper Willamette River basin. Winter steelhead trout and summer steelhead trout generally spawn naturally in the same areas in the North Santiam River basin downstream of Detroit Dam. Winter steelhead trout and summer steelhead trout generally spawn naturally in the same areas in the South Santiam River basin downstream of Foster Dam.

24. There is overlap in the spawn timing of winter steelhead trout and summer steelhead trout in the North Santiam basin. There is overlap in the spawn timing of winter steelhead trout and summer steelhead trout in the South Santiam River basin.

25. Winter steelhead trout interbreed with summer steelhead trout in the North Santiam River basin downstream of Detroit Dam. Winter steelhead trout interbreed with summer steelhead trout in the South Santiam River basin downstream of Foster Dam. Offspring of naturally-spawned and hatchery adults are less fit than offspring of two naturally-spawned adults. Offspring of naturally-spawned and hatchery adults are less likely to reproduce than offspring of two naturally-spawned adults.

26. Spawning and rearing habitat for winter steelhead trout in the North Santiam River basin exists above Big Cliff Dam and Detroit Dam. Big Cliff Dam and Detroit Dam are impassable barriers to the upstream migration of adult winter steelhead in the North Santiam River basin. Adult winter steelhead trout are not transported into habitat in the North Santiam River basin upstream of Big Cliff Dam and Detroit Dam. Winter steelhead trout compete with summer steelhead trout for available habitat in the North Santiam River basin below Big Cliff Dam.

27. Winter steelhead trout compete with summer steelhead trout for available habitat in the South Santiam River basin downstream of Foster Dam and Green Peter Dam.

28. The Corps has a legal duty to mitigate for fish habitat lost or degraded by its projects in the upper Willamette River basin. The Corps has discretionary involvement or control as to how to meets its duty to mitigate for fish habitat lost to or degraded by its projects in the upper Willamette River basin.

29. The sole purpose of releasing summer steelhead trout into the upper Willamette River basin is to create or sustain opportunities for fishing. The purpose of releasing summer steelhead trout into the upper Willamette River basin is not to mitigate for effects on winter steelhead trout of Corps projects in the upper Willamette River basin.

30. The Corps owns the buildings at the Marion Forks Hatchery on the North Santiam River. The U.S. Forest Service owns the land on which the Marion Forks Hatchery is built. The Corps owns the Minto fish facility on the North Santiam River. The Corps owns the land on which the Minto fish facility is built. The Minto fish facility is the sole source of spring Chinook salmon collected and released into the North Santiam River basin above Detroit Dam.

31. The Corps owns the land on which the South Santiam Hatchery is built. The Corps owns the South Santiam Hatchery. The Corps co-owns the South Santiam Hatchery, with ODFW co-owning parts of it. Historically, the South Santiam Hatchery was used to produce and release spring Chinook salmon and summer steelhead trout. Summer steelhead trout produced at the South Santiam Hatchery were released into other parts of the upper Willamette River basin. Historically, summer steelhead trout produced at the South Santiam Hatchery were released into the North Santiam River. Historically, summer steelhead trout produced at the South Santiam Hatchery were released into the McKenzie River. Summer steelhead trout produced at the South Santiam Hatchery could be released into rivers where they would not residualize or return as adults and occupy habitat for winter steelhead trout.

32. Historically, broodstock for summer steelhead trout produced at the South Santiam Hatchery was collected at the Foster fish facility. The only currently effective fish collection facility on the South Santiam River for spring Chinook salmon, winter steelhead trout, or summer steelhead trout is the Foster fish facility. The Corps owns the Foster fish facility. Currently, the Foster fish facility is the sole source of winter steelhead trout and spring Chinook salmon that are collected and released into the South Santiam River basin above Foster Dam.

33. Summer steelhead trout are currently being reared at the South Santiam Hatchery. The Corps paid for or otherwise controlled the production of the summer steelhead trout currently being reared at the South Santiam Hatchery. The summer steelhead trout currently being reared

at the South Santiam Hatchery are scheduled for release in April, 2018 into the South Santiam River. The target is for approximately 160,000 summer steelhead trout to be released in April, 2018 into the South Santiam River. The Corps retains control over where these fish will be released and when release[s] will occur.

34. In 2017, the Corps contracted with ODFW to produce and/or release spring Chinook salmon and summer steelhead trout from Corps facilities in the upper Willamette River basin. The contract is for a one-year term, with a one-year option period, which may be exercised at the Corps' discretion. The Corps will pay ODFW to produce 639,000 spring Chinook smolts at the South Santiam Hatchery for release into the South Santiam River.

35. ODFW may use state funds to produce and release summer steelhead trout from the South Santiam Hatchery into the South Santiam River after 2018. ODFW will use state funds to produce and release summer steelhead trout from the South Santiam Hatchery into the South Santiam River after 2018.

36. The Corps will pay ODFW to produce and release summer steelhead trout from the Marion Forks Hatchery into the North Santiam River basin. The target release funded by the Corps is 114,000 summer steelhead trout smolts. ODFW will release summer steelhead trout smolts into the North Santiam River in 2018. ODFW will release approximately 114,000 summer steelhead trout smolts into the North Santiam River in 2018. ODFW may use state funds to produce more than 114,000 summer steelhead trout at the Marion Forks hatchery. ODFW will use state funds to produce more than 114,000 summer steelhead trout at the Marion Forks Hatchery. The Corps could prohibit ODFW from using the Marion Forks Hatchery to produce any summer steelhead trout. The Corps could prohibit ODFW from releasing any summer steelhead trout from the Marion Forks Hatchery.

37. The Corps pays ODFW to produce spring Chinook salmon at the McKenzie Hatchery and release them from that hatchery into the McKenzie River. The Corps has paid or will pay ODFW to produce 360,000 spring Chinook smolts at the McKenzie Hatchery and release them into the McKenzie River in 2018. ODFW will use state funds to pay for the production of an

additional 244,750 spring Chinook at the McKenzie Hatchery for release into the McKenzie River in 2018.

38. In 2007, the Corps, the Bonneville Power Administration, and the U.S. Bureau of Reclamation prepared a Supplemental Biological Assessment and consulted with NMFS to obtain its opinion as to effects of federal actions and facilities affecting ESA-listed salmonids in the upper Willamette River basin. In 2008, NMFS issued a Biological Opinion (“BiOp”) as to effects on winter steelhead trout and spring Chinook salmon of these and other federal facilities and actions.

39. Since the BiOp was issued, new information and data reveal that releases of summer steelhead trout into the South Santiam River basin and the North Santiam River basin harm and impede recovery of winter steelhead trout to an extent not previously considered or evaluated in the BiOp.

40. Genetic analyses have identified approximately 10 percent of the juvenile steelhead at Willamette Falls as summer x winter-run hybrids. Genetic analyses have identified approximately 11.1 percent of the steelhead trout in the North Santiam River as summer x winter-run hybrids. Recent genetic analyses have identified approximately 14.8 percent of steelhead trout in the South Santiam River as summer x winter-run hybrids. Hybridization among winter steelhead trout and summer steelhead trout in the North Santiam River and the South Santiam River decreases productivity of the winter steelhead trout population.

41. The facilities at Foster Dam include a fish counting station. From 1990 to 2005, a range of 1,618 to 2,853 winter steelhead trout “natural spawners” returned to the South Santiam River. From 1990 to 2005, an average of 2,149 winter steelhead trout “natural spawners” returned to the South Santiam River. By August, 2017, 18 winter steelhead trout “natural spawners” had returned to the Foster fish counting station in 2017. By August, 2017, 401 summer steelhead trout had returned to the Foster fish counting station in 2017.

42. Upper Bennett Dam and Lower Bennett Dam are located southeast of the town of Stayton, Oregon, on the North Santiam River. Upper Bennett Dam is on the south side of Stayton Island on the North Santiam River. Lower Bennett Dam is on the north side of Stayton Island on

the North Santiam River. Upper Bennett Dam and Lower Bennet Dam each includes fish passage structures and video cameras to count fish. From 1900 to 2005, a range of 1,485 to 2,994 winter steelhead trout returned to the North Santiam River. From 1990 to 2005, an average of 2,109 winter steelhead trout returned to the North Santiam River. By September, 2017, approximately 168 winter steelhead trout passed the fish counting stations at Upper and Lower Bennett Dams in 2017. By September, 2017, approximately 558 summer steelhead trout passed the fish counting stations at Upper and Lower Bennett Dams in 2017.

43. The Corps authorizes, funds, or facilitates the production of hatchery rainbow trout in the upper Willamette River basin. The Corps authorizes, funds, or facilitates the release of hatchery rainbow trout into the upper Willamette River basin. The Corps authorizes, funds or facilitates the release of hatchery rainbow trout into Foster Reservoir in the South Santiam River basin. The Corps authorizes, funds or facilitates the release of hatchery rainbow trout into Foster Reservoir in the South Santiam River basin. Released rainbow trout are fingerling or “legal-size” fish, meaning they are generally eight inches or larger.

44. Annual releases of rainbow trout into Foster Reservoir in 2014, 2015, and 2016 amounted to approximately 42,828 fish.

45. Adult winter steelhead trout and spring Chinook salmon are collected at the Foster fish facility and placed into the South Santiam River upstream of Foster Dam in order to spawn. Adult spring Chinook salmon are collected at the Minto fish facility and placed into the North Santiam River upstream of Detroit Dam in order to spawn. Hatchery rainbow trout released upstream of Foster Dam prey upon winter steelhead trout fry, smolts, or juveniles. Hatchery rainbow trout released upstream of Detroit Dam prey upon winter steelhead trout and spring Chinook salmon fry, smolts, or juveniles. Hatchery rainbow trout released upstream of Foster Dam compete for resources with winter steelhead trout fry, smolts, or juveniles. Hatchery rainbow trout released upstream of Detroit Dam compete for resources with winter steelhead trout and spring Chinook salmon fry, smolts, or juveniles. In 2008, mortality to out-migrating juvenile winter steelhead trout from hatchery rainbow trout above Foster Dam was estimated to be 8% to 10%.

Claims for Relief: ESA

46. Plaintiffs re-allege the allegations above.

47. To comply with Section 7 of the ESA, the Corps of Engineers is required to reinitiate consultation where it has discretionary involvement or control over facilities or activities that affect winter steelhead trout in the North Santiam River and South Santiam River basins and (a) the amount or extent of taking specified in the incidental take statement is exceeded or (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. 16 U.S.C. § 1536(a); 50 C.F.R. § 402.16. Among other sources of new information, the number of adult winter steelhead trout returning to the North Santiam River and the South Santiam River in 2017 constitutes new information that reveals effects of the action that may affect winter steelhead trout or its critical habitat in a manner or to an extent not previously considered. Among other sources of new information, recent PHOS of summer steelhead trout in the North Santiam River and South Santiam River basins constitutes new information that reveals effects of the action that may affect winter steelhead trout or its critical habitat in a manner or to an extent not previously considered. Among other sources of new information, recent studies proving high rates of hybridization among winter steelhead trout and summer steelhead trout constitute new information that reveals effects of the action that may affect winter steelhead trout or its critical habitat in a manner or to an extent not previously considered. The Corps has illegally failed to re-initiate consultation with NMFS to obtain its opinion as to how the facilities and activities it authorizes, funds, or facilitates affects winter steelhead trout or its critical habitat, and jeopardize its continued existence.

48. The Corps is in violation of Section 7(d) of the ESA, 16 U.S.C. § 1536(d), for making irreversible and/or irretrievable commitments of resources before completing the reinitiation of consultation under Section 7(a)(2) on the effects to winter steelhead trout in the North Santiam River and South Santiam River basins. The Corps' authorization, funding, or facilitation of the production and release of summer steelhead trout into these basins constitute irreversible and/or irretrievable commitments of resources that violate this provision.

49. NMFS has promulgated regulations under Section 4 of the ESA that extend the “take” prohibition in 16 U.S.C § 1538 to winter steelhead trout and spring Chinook salmon in the upper Willamette River basin as threatened species. 50 C.F.R. § 223.203(a). Section 9 of the ESA prohibits the Corps from authorizing, funding, or facilitating take of winter steelhead trout and take of spring Chinook salmon in the South Santiam River and North Santiam River basins. 16 U.S.C. § 1538(a)(1)(B). The Corps has violated and continues to violate Section 9 of the ESA, by causing take of winter steelhead trout and spring Chinook salmon through the release of hatchery rainbow trout into habitat for winter steelhead trout and spring Chinook salmon.

Relief Requested.

Plaintiffs respectfully request that the Court grant the following relief:

1. Issue a declaratory judgment that the Corps has violated Section 7 of the ESA by failing to reinitiate consultation with NMFS as to effects on winter steelhead trout of the release of summer steelhead trout into the North Santiam River and South Santiam River basins;
2. Issue a declaratory judgment that the Corps has violated Section 7 of the ESA by making irreversible and/or irretrievable commitments of resources before completing reinitiation of consultation under Section 7 on the effects on winter steelhead trout of the release of summer steelhead trout into the North Santiam and South Santiam River basins;
3. Issue a declaratory judgment that the Corps has violated Section 9 of the ESA by causing take of winter steelhead trout and spring Chinook salmon through release of hatchery rainbow trout upstream of Foster Dam and Detroit Dam;
4. Order the Corps to cease authorizing, facilitating, or funding production or release of summer steelhead trout into the North Santiam River and South Santiam River basins;
5. Order that no summer steelhead trout may be released into the South Santiam River or North Santiam River basins;
6. Order the Corps to cease authorizing, facilitating, or funding the production or release of rainbow trout into the South Santiam River basin upstream of Foster Dam, and the North Santiam River upstream of Detroit Dam;

7. Award Plaintiffs reasonable costs, expenses, and attorneys' fees associated with this case pursuant to the ESA and any other applicable authorities;
8. Grant such other further relief as Plaintiffs may pray for or the Court deems just and proper.

Date: September 15, 2017.

Respectfully submitted,

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